SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

MARCH TERM, 1969

No. 1105

IRVING A. BERK, d/b/a BERK TRADE SCHOOL
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

A Writ of Certiorari is respectfully sought to review the order of the Court of Claims dismissing the petitioner's petition on motion of respondent for summary judgment.

Opinion Below

There was no report of opinion by the court below. The opinion of the court below is set forth in "Appendix A", to this petition.

Jurisdiction

Jurisdiction is invoked pursuant to 28 U.S.C.A. § 1255 (1), to review an order of the United States Court of Claims, filed October 4, 1968, which granted defendant's motion for summary judgment and dismissed the petition of petitioner therein.

There was no order respecting rehearing. Extension of time in which to file a Petition for Writ of Certiorari through March 3, 1969, was granted by order of Mr. Justice Harlan, on January 7, 1969.

Questions Presented

The respondent made a motion for summary judgment claiming the petitioner's claim was barred by the Statute of Limitations in response to which petitioner submitted a brief in opposition. The respondent then submitted a reply brief demanding relief of dismissal on the ground of "res adjudicata". The court dismissed the petition on the ground of "res adjudicata".

1. Whether the Court of Claims acted improperly and in violation of its rules and the rights of petitioner by granting relief to respondent, and upon grounds not stated or requested in its motion application, but only in its reply brief and without affording petitioner an opportunity to respond to the new motion contained in respondent's reply brief.

2. Whether the Court of Claims improperly concluded that the petitioner's claim in the Court of Claims had "already been satisfied as a result of a judgment" in the District Court of the Eastern District of New York.

Statutes Involved

Rules 11 and 12 of the Rules of the Court of Claims, set forth in "Appendix B", *infra*.

Statement

The petitioner herein commenced an action in the United States Court of Claims to recover the sum of $72,201 earned by petitioner for services and materials provided pursuant to successive contracts with the government.

By Certificate of Indebtedness dated March 9, 1962 and issued by the Comptroller General of the United States, the respondent acknowledged its indebtedness to the petitioner in that amount.

After the commencement of the action, the respondent made a motion for summary judgment on the sole ground that the action was barred by the Statute of Limitations (28 U.S.C. 2501).

The petitioner submitted a brief in opposition proving that the action was commenced within the statutory period. Then the respondent submitted a "Defendant's Reply Brief" which requested dismissal on the ground of "res adjudicata." The petitioner then served and submitted to the court a brief in response to the Reply Brief opposing the Reply Brief on the grounds that: 1) the Reply Brief pleaded new matter and was unauthorized by the Rules of the Court of Claims, and 2) that the action was not barred by "res adjudicata."

This last brief of the petitioner was rejected by the court and returned to petitioner since briefs in response to reply briefs are not authorized by the rules of the court. The court then issued the order appealed from here granting the relief requested in the Respondent's Reply Brief.

Reasons for Granting the Writ of Certiorari

I.

The order of the court below is wholly without the authority of the court as set forth in the Rules of the Court of Claims and in violation of the meaning and intention of the Rules and motion practice.

Rules 11 and 12 set forth the sole method of making a dispositive motion in the Court of Claims. Such motion shall be in the form of a motion, in writing, and to which the opposing party may submit objections and responses within 30 days after service. The moving party then has 15 days to file a reply brief, to which there is no authorized response as a matter of right.

Respondent's original papers, in conformity with the Rules, was titled a "Motion for Summary Judgment," and it presented the "Question: Whether plaintiff's claim is barred by 28 U.S.C. § 2501 . . .?" The Conclusion stated only that the "plaintiff is barred by the Statute of Limitations.

The Reply Brief was such only in designation since it did not reply to petitioner's brief but was in reality a new motion albeit not on the form of an application or motion.

Although petitioner received the Reply Brief there was no 30-day notice to petitioner and it did not afford the petitioner the opportunity to respond or object as a matter of right. In fact, petitioner's responsive brief was rejected. It did not permit a responsive brief as a matter of right and yet granted the new relief claimed upon the new ground stated in the Reply Brief.

The Court thus issued an order upon a motion not authorized by its Rules and did not afford the petitioner the opportunity of responding.

II.

The court below improperly concluded that Petitioner's claim had been satisfied by a prior judgment.

The petitioner's brief which was refused and not considered by the Court of Claims explained that the prior judgment referred to in its order is presently on appeal.

In the District Court of the Eastern District of New York, the United States sued the petitioner for approximately $94,000. The complaint in that action stated and admitted that the United States owed petitioner $72,201. The complaint credited petitioner with this amount and claimed as damaged the difference of approximately $22,000. Petitioner's Answer in that action asserted a denial and counterclaim to recover $72,201.

At the trial the defendant's counterclaim was dismissed for lack of jurisdiction but without prejudice to his commencing a new cause of action in the Court of Claims for $72,201.

After trial, Judge Zavatt decided that the government by mistake had overpaid petitioner $94,000 and after deducting the $72,201 as a credit, rendered judgment to the government for the balance.

The petitioner then filed a notice of appeal from the District Court judgment. The transcript has been obtained at a cost of over $800. The record on appeal has been docketed at the Circuit Court of Appeals, Second Circuit and the appeal will be perfected in approximately one month.

If the District Court judgment is reversed, as petitioner believes it will be, it will be only on the ground that the government's claim against petitioner is unfounded, and

therefore that there is no money owed by petitioner against which to credit the $72,201 which is admittedly owed to petitioner. If the appeal pending is successful then there is obviously no bar to the action in the Court of Claims.

The petitioner's brief in response to the Reply Brief which was rejected and returned, finally urged the court to dismiss the respondent's request based on "res adjudicata" without prejudice pending the outcome of the appeal pending in the Circuit Court of Appeals.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF CLAIMS

No. 93—68

IRVING A. BERK, d/b/a Berk Trade School

v.

THE UNITED STATES

Before Cowen, *Chief Judge,* Laramore, Durfee, Davis, Collins, Skelton and Nichols, *Judges.*

ORDER

This case comes before the court on defendant's motion, filed April 18, 1968, for summary judgment. Upon consideration thereof, together with the response in opposition thereto, without oral argument, it is concluded that plaintiff's claim has already been satisfied as a result of the judgment of the United States District Court for the Eastern District of New York in *United States of America* v. *Irving A. Berk d/b/a Berk Trade School,* No. 63-C-960, and

IT IS ORDERED, that defendant's said motion for summary judgment be and the same is granted and plaintiff's petition is dismissed.

By the Court

Oct. 4, 1968

.....

Chief Judge

APPENDIX B

Statutory Provisions Involved

Rules of the Court of Claims of the United States

Rule 11. Motions and Related Papers

(a) Content of Motions: Every application to the court or the commissioner for an order shall be by written motion filed with the clerk. The motion shall state with particularity the grounds therefor and shall set forth the relief or order sought.

Rule 12. Motions: Dispositive and Procedural; Objections and Responses

(a) Dispositive Motions Defined: Dispositive motions include . . . (3) motions to dismiss (Rule 67); (4) motions for summary judgment (Rule 64).

(b) Time for Filing: (1) Objections and Responses to Dispositive Motions: Objections or a response to a dispositive motion shall be filed within 30 days after the service of such motion.

(2) Reply Briefs: The moving party shall have 15 days from the date of the service of the objections or response to such motion within which to file a reply brief.